

A Sebor (Sarawak) Marketing & Services Sdn Bhd v
SA Shee (Sarawak) Sdn Bhd

HIGH COURT (KUCHING) — ORIGINATING MOTION NO 25-37 OF
1999-I

IAN CHIN J

B 3 APRIL 2000

Arbitration — Award — Setting aside — Application — Appointment of arbitrator, whether valid — Arbitration agreement deduced from minutes and other documentations between parties — Procedure applicable in arbitration to be inferred from agreement between parties — Absence of oral hearing and examination of witnesses, whether amount to procedural unfairness — Misconduct of arbitrator — Failure to consider loss of interest and post-award interest, whether misconduct

D The applicant applied for an order that the award made between them and the respondent in an alleged arbitration by the arbitrator be set aside or remitted for reconsideration on the following grounds:
E (a) that the arbitrator was not validly appointed or that the parties never made a binding arbitration agreement; (b) that even if the arbitrator was validly appointed, he failed to consider all the evidence before him or had behaved unfairly or gives such an appearance, thereby amounting to misconduct. It was also submitted that the arbitrator has misdirected himself in: (a) deciding that the rate of painting the internal plastered wall for Damai Lagoon Hotel to be RM0.35 per fs; (b) awarding cost of the banker's guarantee against the applicant; (c) failing to consider the applicant's loss of interest; (d) failing to award interest on the sum awarded between the due date and the date of the award; and (e) ordering the applicant to reimburse the respondent the sum of RM168,263.30 for cost of rectification.
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Held, granting the applicant's application in part:

- G (1) There was no doubt that the parties have agreed albeit orally to submit to the arbitrator. Furthermore, a written agreement to refer to arbitration can be deduced from the minutes recording the agreement and the written acceptance by the arbitrator of his appointment. Also, by the time the minutes recording the agreement of the parties was submitted to the arbitrator, there was already a formulated dispute which persisted till the first attendance of the parties before the arbitrator. Therefore, it can only be concluded that an arbitrator had been appointed and the parties had made a binding arbitration agreement (see pp 7B, E-F, H-8A).**
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I (2) There is no law to lay down what specific procedural steps an arbitration must follow. It may be possible to infer an agreement on one or more aspects of the procedure from the way in which the parties have already begun reference (see p 8G-I); *Star International Hong Kong (UK) Ltd v Bergbau-Handel GmbH* [1966] 2 Lloyd's Rep 16 followed. In this case, since the applicant

in all the meetings have never requested for an oral hearing or for witnesses to be formally called and examined, it may be implied that the absence of a hearing was part of the agreed procedure and the same would not constitute procedural unfairness. Also, the urging for the parties to come to compromises could not be regarded as misconduct on the part of the arbitrator (see pp 9A, 14G–H).

- (3) Since the parties had, in relation to the Riverside Hotel project, agreed at the rate of RM0.35, it was only reasonable for the same rate to be applied to the Damai Lagoon Hotel project (see p 18E).
- (4) The cost of the guarantee was RM11,365.95 — demanded by the applicant to cover their claim of RM504,818.07. Since the applicant only succeeded in claiming RM54,128.52, which is only 10.72% of their claim, it is only equitable that the applicant should bear the balance of 89.28% of the cost of providing the guarantee. On the other hand, the applicant's claim for loss of interest for the period the money became due but were not paid should have been considered and reasons should be given for awarding such and for how much or for rejecting such a claim. As the arbitrator had failed to do so, this claim must be remitted to him for his further consideration (see p 17B–C, 19A–B).
- (5) As the arbitrator failed to consider the issue of post-award interest on the sum awarded in the applicant's favour, this matter must be remitted to the arbitrator for his consideration and decision, (see p 18H).
- (6) The arbitrator had rightly ordered that the applicant reimburse the respondent the sum of RM168,263.30 for cost of rectification of the paint-job since the applicant had failed to provide an independent opinion as regards whether the discolouration of the paint was due to the surface defect or paint defect (see p 17D–E).

[Bahasa Malaysia summary]

Pemohon telah membuat permohonan untuk satu perintah supaya award di antara mereka dan responden dalam satu pengataan timbangtara oleh penimbangtara diketepikan atau diremitkan kembali untuk dipertimbangkan semula atas alasan-alasan berikut: (a) penimbangtara telah tidak dilantik secara sah atau pihak-pihak yang berkaitan tidak membuat sebarang perjanjian untuk timbangtara yang mengikat mereka; (b) sekalipun penimbangtara telah dilantik secara sah, beliau telah gagal untuk mengambil kira semua keterangan yang dikemukakan kepada beliau atau telah berpelakuan tidak adil atau telah memberikan gambaran sedemikian, yang menjadikan perlakuan tersebut satu salah laku. Juga telah dimajukan penghujahan yang penimbangtara telah salah arah dirinya dalam: (a) memutuskan

- A** yang kadar mengecat bahagian dalam dinding berplaster untuk Hotel Damai Lagoon adalah RM0.35 per kp; (b) membuat award kos jaminan bank terhadap pemohon; (c) kegagalan mengambilkira kerugian pemohon dari segi faedah; (d) kegagalan untuk membuat award bagi faedah di antara tarikh pembayaran patut dibuat dan tarikh award; dan (e) mengarahkan pemohon membuat bayaran ganti kepada responden sebanyak RM168,263.30 untuk kos pembetulan.
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Diputuskan, membenarkan sebahagian permohonan pemohon:

- (1) Tidak ada sebarang kesangsian yang pihak-pihak yang berkaitan telah bersetuju walaupun secara lisan untuk menerima timbangtara. Tambahan pula, satu deduksi boleh dibuat bahawa telah wujud persetujuan bertulis untuk merujuk kepada timbangtara berdasarkan minit yang merekodkan persetujuan dan penerimaan secara bertulis oleh penimbangtara berhubung dengan perlantikannya. Lagipun, pada masa minit yang merekodkan persetujuan pihak-pihak yang berkaitan untuk menerima timbangtara dibuat, telah pun wujud pertikaian yang diformulasikan yang berterusan sehingga perjumpaan pertama di antara pihak-pihak tersebut dan penimbangtara. Oleh itu, kesimpulannya adalah jelas yang seorang penimbangtara telah dilantik dan pihak-pihak yang berkaitan telah mencapai persetujuan untuk menggunakan timbangtara yang mengikat mereka (lihat ms 7B, E-F, H-8A).
- (2) Tidak ada undang-undang yang menetapkan langkah-langkah prosedur spesifik yang mesti diikuti dalam penimbangan. Adalah mungkin untuk membuat andaian wujudnya persetujuan melibatkan satu atau lebih aspek-aspek prosedur berasaskan bagaimana cara pihak-pihak yang berkaitan telah pun merujuk (lihat ms 8G-I); *Star International Hong Kong (UK) Ltd v Bergbau-Handel GmbH* [1966] 2 Lloyd's Rep 16ikut. Dalam kes ini, oleh kerana pemohon di dalam semua mesyuarat tidak pernah meminta diadakan pembicaraan lisan atau supaya saksi dipanggil secara formal dan dibuat pemeriksaan, adalah tersirat yang ketiadaan pembicaraan adalah sebahagian dari prosedur yang telah dipersetujui dan tidak menyebabkan wujudnya ketidakadilan dari segi prosedur. Tambahan pula, desakan untuk pihak-pihak yang terlibat untuk bertolak-ansur tidak boleh dianggap sebagai silap laku oleh penimbangtara (lihat ms 9A, 14G-H).
- (3) Oleh kerana pihak-pihak yang terlibat telah, berhubung dengan projek Hotel Riverside, bersetuju dengan kadar RM0.35, adalah munasabah yang kadar yang sama digunakan untuk projek Hotel Damai Lagoon (lihat ms 18E).
- (4) Kos gerenti yang berkaitan adalah RM11,365.95 — dituntut oleh pemohon sebagai sebahagian daripada tuntutan mereka sebanyak RM504,818.07. Oleh kerana pemohon hanya berjaya menuntut
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- D**
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RM54,128.52, iaitu hanya 10.72% dari tuntutan mereka, adalah wajar bagi pemohon menanggung baki 89.28% kos penyediaan gerenti tersebut. Walaupun begitu, tuntutan pemohon berhubung dengan kehilangan faedah untuk jangkamasa bayaran patut dibuat tetapi telah tidak dibayar sepatutnya diambil kira dan alasan-alasan sepatutnya diberi untuk award tersebut dan untuk sebanyak mana atau untuk penolakan tuntutan tersebut. Oleh kerana penimbangtara telah gagal untuk berbuat demikian, tuntutan ini hendaklah diremit semula kepada beliau untuk pertimbangan selanjutnya (lihat ms 17B-C, 19A-B).

- (5) Oleh kerana penimbangtara telah gagal mengambil kira isu faedah selepas award dibuat berhubung dengan jumlah award kepada pemohon, perkara ini mestilah diremit kembali kepada penimbangtara untuk pertimbangan dan keputusannya (lihat ms 18H).
- (6) Penimbangtara adalah betul dalam membuat perintah supaya pemohon membuat bayaran ganti kepada responden sebanyak RM168,263.30 untuk kos pembetulan kerja-kerja mengecat oleh kerana pemohon telah gagal mengemukakan pendapat yang bebas berhubung sama ada perubahan warna cat adalah disebabkan oleh permukaan yang tidak sempurna atau pun cat yang tidak baik (lihat ms 17D-E).]

Notes

For cases on setting aside of arbitration awards, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 957-979.

Cases referred to

Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84 (refd)

Baker v Yorkshire Fire and Life Assurance Co [1892] 1 QB 44 (refd)

Chow Yoke Pui v Tan Tuan Boon [1971] 1 MLJ 190 (refd)

Hickman v Kent [1915] 1 Ch 881 (refd)

Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd [1999] 5 MLJ 137 (refd)

Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51 (refd)

Morgan v William Harrison Ltd [1907] 2 Ch 137 (refd)

Sharikat Pemborong Pertanian Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Star International Hong Kong (UK) Ltd v Bergbau-Handel GmbH [1966] 2 Lloyd's Rep 16 (folld)

Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd (No 2) [1988] 2 MLJ 502 (refd)

A Legislation referred to

Arbitration Act 1952, ss 2, 13(2)

SY Chan (Ee & Lim) for the applicant.

Frank Tang (Tang & Partners) for the respondent.

B

Cur Adv Vult

Ian Chin J*Introduction*

C This is a motion by Sebor (Sarawak) Marketing Sdn Bhd ('the applicant') for an order that the award made between them and SA Shee (Sarawak) Sdn Bhd ('the respondent') in an alleged arbitration by Wong Hai Ong on 28 July 1999 be set aside or remitted for the reconsideration by the said Wong Hai Ong ('the arbitrator'). The grounds urged for the making of the order are:

- D** (1) That the arbitrator was not validly appointed or that the parties never made a binding arbitration agreement;
- (2) That even if the arbitrator was validly appointed by the parties to arbitrate on the dispute between the parties, the arbitrator failed to consider all the evidence brought before him or had behaved in a way which is, or gives the appearance of being unfair, thereby amounting to misconduct.
- E** (3) That in deciding that the rate of painting the internal plastered wall for Damai Lagoon Hotel shall be RM0.35 per fs, he has misdirected himself and erred in fact and law, or otherwise has acted unfairly against the interest of the applicant.
- F** (4) That in awarding cost of the banker's guarantee against the applicant and without considering the applicant's loss of interest, the arbitrator has misdirected himself and erred in law, or otherwise has acted unfairly against the interest of the applicant.
- G** (5) That the failure to award interest on the sum of money awarded in favour of the applicant between the date when it ought to have been paid and the date of the award amounted to a technical misconduct.
- (6) That in ordering the applicant to reimburse the respondent the sum of RM168,263.30 for cost of rectification, the arbitrator has misdirected himself and erred in fact and law, or otherwise has acted unfairly, or gives the appearance of being unfair, thereby amounting to misconduct.
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Those grounds call for a consideration of the circumstances leading to the award and this requires the facts to be set out.

I Facts of case

Three projects, namely, Permata Car Park, Riverside Majestic Hotel and Damai Lagoon Hotel, were owned by the Sarawak Economic Development

Corp (SEDC). The respondent contracted with the applicant for the applicant to supply goods and paint work for the said projects. The said projects had as its consultant the company of JUBM (M) Sdn Bhd, a company of surveyors, of which the arbitrator was the managing director. Disputes arose between the applicant and the respondent as regards the amount owing by the respondent to the applicant.

A meeting attended by the representatives of the parties was held on 30 July 1997 and it was chaired by the general manager of SEDC. It was held in an attempt to resolve the dispute. In this meeting the applicant particularize their claims totalling RM504,886.08 and interest of RM138,302.04. These were disputed and proposals for a compromise were not accepted. The minutes then recorded the following agreement:

- (a) That [the applicant] will re-check on the contract, and if there is an overcharge/undercharge either party liable to pay the undercharge/reimburse the overcharge will do so.
- (b) That both parties reconcile their respective measurements/re-measure area by area.
- (c) That [the respondent] remedy the defects on the paint job at [the applicant's] costs, which shall be reimbursed to [the applicant] if the arbitrator rules in [the applicant's] favour.
- (d) That Mr Wong Hai Ong [the arbitrator] be appointed (on a moral basis) to arbitrate the dispute between the parties.
- (e) That the decision of the arbitrator shall be final, conclusive and binding on the parties.
- (f) That SEDC will inform the arbitrator of his appointment as such.
- (g) That the arbitration be conducted/held on or before 30 August 1997 and the SEDC informed on the outcome thereof.

The arbitrator in writing on 6 August 1997 accepted the appointment 'as mediator/arbitrator' when replying to a letter of SEDC that conveyed the minutes to him. The arbitrator then prepared the following document for the signature of the parties, viz:

Pursuant to the Minutes of Meeting (Copy Enclosed) held on 30 July 1997 at 8.30 am at 11th Floor (Nerve Centre), Menara SEDC, Jalan Tunku Abdul Rahman, Kuching. We, the undersigned have been authorized by our respective company to agree items 8(d) and (e) of the Minutes and have further agreed that the Terms of Reference given by Perbadanan Pembangunan Ekonomi Sarawak (SEDC) to the Mediator, Mr Wong Hai Ong will abide by us unconditionally.

[Space for Signatures, etc ...]

The parties did not sign the document. Nevertheless the parties attended before the arbitrator in fourteen meetings held between 23 August 1997 and 12 April 1999. Witnesses were not called to testify. The arbitrator's company took various measurements which are matters of contention between the parties. In many of those meetings, the arbitrator urged the

- A parties to compromise. This is the convenient place to pause to consider ground (1).

Whether the arbitrator was appointed or whether the parties made a binding arbitration agreement

- B There is no doubt that the parties have agreed albeit orally to submit to the arbitrator. Their agreement was expressed in the July 30 meeting and recorded in the minutes. The arbitrator accepted the appointment. The intention was still there even though the parties did not sign the document to appoint the arbitrator because the parties, though they did not explain why they did not, also did not say that they changed their mind regarding the appointment of the arbitrator. That the parties did not change their mind can be gathered from the fact that they, even though they did not sign the document, had attended before the arbitrator on fourteen occasions in relation to the disputes. The intention to refer their disputes to the arbitrator for resolution is still there. But there is no formal document signed by any of the parties to signify their consent to refer the disputes to arbitration. This brings me to the question of whether a written agreement is necessary. Under the Arbitration Act 1952, s 2, an 'arbitration agreement' is defined to mean 'a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. However, the written agreement need not be signed by both as, for example,
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- E in *Baker v Yorkshire Fire and Life Assurance Co* [1892] 1 QB 44 where an assured affirmed a policy that he did not sign but still sue on and was held to be bound by an arbitration clause. In *Hickman v Kent* [1915] 1 Ch 881 it was held that an article of association of a limited company providing for arbitration is a sufficient submission in writing. Furthermore, such an agreement can be deduced from correspondence exchanged between the parties (*Morgan v William Harrison Ltd* [1907] 2 Ch 137). Therefore, the minutes recording the agreement of the parties to submit to the arbitrator and the written acceptance by the arbitrator of his appointment as such constitute the written agreement to refer to arbitration. Though subsequent conduct, like attending before the arbitrator, cannot be used to construe the agreement it may nevertheless be used to support the plea that a party should be estopped from denying the existence of the agreement to submit to arbitration and the appointment of the arbitrator. This is how Lord Denning MR puts it in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 at p 120:
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- H So here we have available to us — in point of practice if not in law — evidence of subsequent conduct to come to our aid. It is available — not so as to construe the contract — but to see how they themselves acted upon it. Under the guise of estoppel we can prevent either party from going back on the interpretation they themselves gave to it.

- I By the time the minutes recording the agreement was submitted to the arbitrator, there was already a formulated dispute which persisted till the first attendance of the parties before the arbitrator. The details of the disputes have already been adverted to earlier and they were set out in the

minutes. Therefore, I am of the view that an arbitrator was appointed and the parties had made a binding arbitration agreement.

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I am not unaware of the argument of Ms SY Chan, learned counsel for the applicant that the arbitrator was appointed a mediator to find an amicable settlement. Though the person appointed was referred to both as arbitrator and as mediator, that does not mean that he cannot arbitrate. He can arbitrate after he had failed in his mediation. The fact of his being a mediator does not prevent the coming into existence of the agreement to submit to arbitration and his appointment as the arbitrator.

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Whether the arbitrator had failed to consider all the evidence brought before him or had behaved in a way which is, or gives the appearance of being unfair, thereby amounting to misconduct

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The misconduct alleged consisted, among others, of the failure on the part of the arbitrator to allow the parties to call witnesses and adduce evidence and of the fact that the arbitrator had entered into the arena by asking the parties to compromise and by taking measurement himself with regard to the disputed measurements. For the consideration of the present argument, more of the facts ought to be narrated and these relate to the meetings before the arbitrator.

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The first meeting was held on 23 August 1997 in the office of the arbitrator and the minutes state it to be a 'First Reconciliation Meeting'. It was attended by the parties' representatives. The arbitrator at that meeting described himself as a 'mediator' and he appealed to the parties to adopt a 'give-and-take' attitude. At this meeting the claim of the applicant, which was set out in a very detailed manner, was referred to and disputed by the respondent. The disagreement related to the size of the area to which paint was applied and the quality and type of the paint. The respondent gave details of their measurement and the rate of payment for the paint-job. The applicant was recorded to have stated that they would check the figures again. The meeting ended without any resolutions. Was that, then, the commencement of the arbitration proceedings?

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There is no law to lay down what specific procedural steps an arbitration must follow. At one extreme of the scale there are formal arbitrations involving pleadings, discovery of documents, oral evidence on oath, cross-examination and closing speeches while at the other end there are most informal kinds where not only is there none of those things mentioned for formal arbitrations but there is also no hearing at all (see Mustill & Boyd on *Commercial Arbitration* at pp 2441–242). In between, there would be variations in the procedure. Of course, the parties themselves may, in the arbitration agreement, lay down the procedure but this has not been done in the present case. However, even where the parties have not expressly provided for the way in which the arbitration is to be conducted, it may be possible to infer an agreement on one or more aspects of the procedure from the way in which the parties have already begun the reference. Thus, in *Star International Hong Kong (UK) Ltd v Bergbau-Handel GmbH* [1966] 2 Lloyd's Rep 16 the parties behaved in such a way

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- A which shows they took for granted there would be no oral hearing. The court there held that it can be implied that the absence of a hearing was part of the agreed procedure. The court there also held that the absence of a hearing did not, ipso facto, constitute procedural unfairness. Similarly, it can be so implied in this case. The first meeting, notwithstanding that the arbitrator was described as a mediator, was indeed the commencement of a
- B very informal arbitration where the disputes were stated very clearly and in detail. There is nothing wrong in this procedure and in fact it is to be recommended when it involves determining the size of the area that was painted, the rate of charges and the quality of the paint which are mere matters of calculation by reference to plans, by visual inspection and by
- C measuring the area of the doors and windows taking up the surface of the building which the paint would not cover and by reference to documents. As the parties and the arbitrator met more and more, the issues were narrowed down. In all these meetings there was never any request for an oral hearing or for witnesses to be formally called and examined and the parties were happy with the manner the matter proceeded. These facts distinguished it from *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51 where an applicant was not given the opportunity to give evidence even though an intention was indicated by the applicant to do so and there the award was remitted.
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- E It would be a waste of time and money to employ the procedure for a formal arbitration to the present case. There are many other arbitrations which should take this informal route, for example, disputes relating to the quality of commodities like pepper, cocoa or coffee which involve smelling, tasting, touching and handling. You do not need any formal hearing nor any witness save the nose, tongue, eyes and hands of an arbitrator knowledgeable in these commodities. To that I would add the matters of the
- F present disputes, that is the area of a building that has been painted, the rate of charges and the quality of the paint used, all of which relate to quantities for which the arbitrator is best qualified to resolve the matter. All that is required is that the parties were allowed to present their case by the submission of whatever documents they chose to without the need to formally produce evidence through witnesses. Ms Chan had referred to
- G *Chow Yoke Pui v Tan Tuan Boon* [1971] 1 MLJ 190 where Sharma J, at p 195, said that one of the essential ingredients of a submission for arbitration is that the parties should intend that the dispute be determined in a quasi-judicial manner. That case concerned the valuation of a partnership share and it was held that since the person conducting the valuation was not required to hold any judicial inquiry, the parties' intention was to appoint him a valuer and not an arbitrator. The present case is not
- H concerned with a partnership share but with quantities and so that case cannot be applied. I would go further to respectfully disagree with the proposition of law stated there, at p 195, which are in these terms:

- I It seems clear from the authorities that once a person is permitted to give a decision which is not a judicial decision, that decision can never be considered as an arbitrator's award. The most important characteristic of an award is that it must emanate from a judicial examination. An award must be the result of

a judicial decision ... In order to constitute a judicial decision there should not only be a judicial inquiry but also a judicial determination ... A judicial decision could only be the result of evidence taken in a judicial manner

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In this regard I prefer the following view expressed in by Mustill & Boyd in *Commercial Arbitration*, at p 48:

(i) *Evidence and contentions.* There is high authority for the view that a procedure is not an arbitration unless it is intended that the arbitrator shall perform a judicial function; and this has been explained as meaning that he must hear evidence and contentions brought forward by the parties, or at least give them the opportunity of bringing them forward. There are, however, serious difficulties in the way of accepting this as a requirement, as distinct from a relevant factor: for a large majority of procedures which are beyond question arbitrations are conducted without any 'contentions' being addressed to the tribunal, in the sense of a formal reasoned argument. In particular:

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(i) In many quality disputes, the arbitrator studies the samples which the parties have furnished, or goes down to the warehouse and inspects the goods and then forms an opinion on the basis of his own expertise. The idea of the parties bringing forward their own experts to prevail on him to come to a different conclusion would be regarded as eccentric and perhaps even subversive: for the whole purpose of choosing arbitration for a quality dispute is that the parties can within the minimum of time and expense obtain a decision from someone in whose independence and expertise they have faith.

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(ii) Many London arbitrations have in the past proceeded upon the basis that the dispute will be dealt with by the two arbitrators chosen by the parties themselves, without invoking the assistance of the umpire or third arbitrator. In such cases, each arbitrator simply receives from the party appointing them a file of documents, which he then proceeds to discuss with his co-arbitrator. Very often the nature of the dispute, and the parties' views upon it, appear so clearly from the files that no further exposition is needed. On the other occasions, a covering letter may elaborate the views of the appointing party. But there is nothing in the nature of a confrontation between the parties or their advocates in the presence of the tribunal. Even in those cases where the arbitrators disagree and an umpire is called in, it often happens that the arbitrators assume the role of 'arbitrator/advocates', and present to the umpire the arguments of those appointed them. This bears no resemblance to the manner in which evidence and argument is advanced in the course of an orthodox judicial process. Yet it has for decades been sanctioned as a proper, and indeed (if correctly used), valuable aspect of English arbitration procedures.

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In these circumstances we suggest that the presence in, or absence from, the agreement of any provision requiring the tribunal to receive evidence and contentions is at most some indication of the intended nature of the proceedings.

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In my view it is not essential that the evidence must be taken in a judicial manner before proceedings can qualify as an arbitration. Therefore, even

A though the present case has nothing resembling 'the judicial manner' ascribed in *Chow Yoke Pui v Tan Tuan Boon*, it is nonetheless an arbitration proceeding. It must not be forgotten that s 13(2) of the Arbitration Act 1952 allows an arbitrator to dispense with the examination on oath or affirmation of a witness which means that an arbitration can be one without the trappings of a judicial inquiry requiring evidence on oath.

B Even the questions of the cost of guarantee and of interests should require no formal arbitration.

As for the points taken by the applicant that the arbitrator had taken measurement himself and that the arbitrator kept asking the parties to compromise regarding certain measurements during the fourth and fifth meetings, what really happened could be gleaned from the minutes of the second meeting. For this purpose it is best that I reproduce the minutes:

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Dispute between SA Shee & Sebor to: (1) Permata Car Park;
(2) Riverside Majestic Hotel; and
(3) Damai Lagoon Hotel

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Minutes of Second Reconciliation Meeting held at
JUBM's Conference Room
on 4 October 1997 at 10.00am

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Present:	Mr Wong Hai Ong — Chairman	JUBM
	Mr Chen Kok Chiu	SEDC
	Mr William Sim	SEBOR
	En Awangku Uman Ali	"
	Mr Andrew Tan	"
	Mr Wong Yik Ka	SA Shee
	Mr Lawrence Sim	"
	Mr Yeoh Boon Seng	"

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1 The Chairman welcomed all present and expressed hope that after Mr Wong of SA Shee commented on the claims by Sebor in the first meeting and subsequent checking by Sebor, the differences would be narrowed down to fewer items if not eliminated completely.

2 Mr William Sim of Sebor confirmed that he and his Subcontractors have checked and would present as follows:

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Riverside

(a) There is no dispute to the number of doors to the Tower Block. However from basement to 3rd Floor, Sebor confirmed a total of 459 numbers of doors against 655 numbers they claimed earlier. This gives a difference of approx 200 numbers of doors even though some of the doors are blocked and could not be seen.

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All parties agreed that a joint inspection be conducted to confirm the above.

(b) Andrew Tan of Sebor confirmed that all doors to hotel guestrooms are done by ID contractor.

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(c) The rate for gypsum ceiling (Pentalite) was quoted by Sebor at 0.62 per fs but Sebor only claimed 0.50 per FS probably due to negotiation in between. However Mr Wong of SA Shee said that they have never agreed to 0.62 per fs. SA Shee to give evidence.

- (d) In item (17a) of their claim, Mr William Sim confirmed that the weathershield (black colour) is behind the curtain wall glass. They will check whether the rate of 0.85 per fs needs to be revised or not. **A**
- (e) In item (17a) of their claim, Mr William Sim confirmed that the side (white colour) is the common party wall near the car park block. SA Shee to confirm whether correct. **B**
- (f) In item (17b), Mr William Sim confirmed that the 'Pentalite' painting to walls and ceiling is to Hotel Services (loading and unloading) areas. SA Shee to confirm whether correct. **B**
- (g) On the claim of RM18,000 by Sebor on touch-up and repainting, Mr William Sim stressed that touch-up and repainting only to patches of the surfaces and thus not easily quantified. He will look into the amount of RM18,000 and will confirm in the next meeting if he can justify the claim. **C**
- (h) Mr William Sim of Sebor maintained that they have touched-up the whole tower with 1 coat of spray coating. In view of that, their quantity of 6444.24m² is correct and not 300m² to 400m² as estimated by Mr Wong of SA Shee. SA Shee to confirm and give evidence. **D**
- (i) Mr William Sim of Sebor confirmed that their claim on external painting to podium block is 10,206m² while Mr Wong of SA Shee has estimated to be $\pm$ 600m². Similarly Sebor claimed 28,677m² internal painting (wall & ceiling) to car park block while SA Shee only estimated $\pm$ 20,446m². Sebor claimed 26,821m² internal painting (wall & ceiling) to shopping podium while SA Shee's estimate is only $\pm$ 20,074m². **E**

Due to the above vast differences, it was agreed that a joint inspection be carried out with the representatives from Sebor, SA Shee and JUBM. Mr Wong of JUBM shall arrange the joint inspection if this dispute still cannot be resolved. **F**

Permata Car Park

- (a) Mr William Sim confirmed that the rate for internal painting (both wall & ceiling) should be RM0.43 per fs. SA Shee to re-confirm. **G**
- (b) Mr William Sim confirmed that their claim to undercoat of external wall is 66,684 FS and not 53,466 fs. SA Shee to re-confirm. **G**
- (c) Mr William Sim of Sebor maintained that the rate for undercoat of external wall should be RM0.15 per fs and not RM0.10 per fs as claimed by SA Shee. SA Shee to re-confirm and give evidence if any. **G**

Damai Lagoon

- (a) Mr William Sim of Sebor confirmed that they have re-counted the number of door to be 384 No (as against 394 number claimed previously). However, Mr Wong of SA Shee counted only 309 number. The joint inspection shall confirm the actual number. **H**
- (b) Mr William Sim showed a letter from SA Shee to prove that the painting rate is 0.43 per fs. SA Shee to check and re-confirm. **I**
- (c) Mr William Sim maintained that their claim was in order and stick to the quantities they claimed as follows: **I**

A

No	Building	External Wall		Internal Wall	
		Sebor	SA Shee	Sebor	SA Shee
1	Main Block	FS	FS	FS	FS
		73,827	68,000	167,902	123,000
2	Block II (88 Rooms)	81,490	48,576	72,565	72,000
3	Block III (120 Rooms)	118,096	66,174	174,024	120,000

B

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The above differences shall be resolved through site measurement to be arranged later.

D

- 4 The subject of discoloured external walls was hotly argued. Mr William Sim of Sebor said that as a gesture of goodwill, their supplier, ICI was willing to supply all weathershield paint required to repaint all the external walls but the contractor must provide the labour to paint. Mr Wong of SA Shee quickly responded saying that Sebor is the contractor doing the painting and SA Shee is actually the Employer employing Sebor to do the painting. He further said that since ICI has agreed to supply the paint, at their own cost, the matter could now be narrowed down to who is the contractor doing the painting work. Mr William Sim of Sebor told the meeting that ICI & Sebor are the supplier and SA Shee is the contractor and thus SA Shee should bear the labour cost of re-painting. However, Mr Wong of JUBM was in the opinion that Sebor is the contractor contracting the painting works from SA Shee with five-year warranty. Unless Sebor can obtain independent proof that the discolourisation is due to salt content in the plaster, they have to deliver the painted walls in acceptable condition and quality to SA Shee who in turn is responsible to the ultimate owner of the building SEDC. Mr Chen of SEDC confirmed that the remedial works on the external walls have almost been completed. How well the ICI weathershield can withstand against discolourization is yet to be seen.

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- 5 The next meeting shall be arranged.

Meeting adjourned at 11.10am.

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As for the disputes concerning the Riverside Majestic Hotel project, they are: (1) the number of rooms; (2) the rate for painting the various places and the area painted; and (3) the sum of RM18,000 for touch-up and repainting. The Permata Car Park project has these disputes: (1) the rate for internal painting; and (2) the rate for the undercoating the external wall and the area painted. The number of doors, the rate for painting, the area painted and the discolouration of the paint are the four disputes that pertain to the Damai Lagoon Hotel project. That meeting resolved that all the differences be resolved by a joint inspection and a joint measurement. Pausing here, I pose the question of how the arbitrator can be faulted for

being able to get the parties to agree to such measures when it is the most practical first step towards establishing the truth of the matter. Each party had their say and each presented their documents in argument. Though it was informal it is nevertheless a process of the arbitration, an informal arbitration that is.

At the third meeting the date and time for the joint inspection and measurement was fixed and it was decided that the matter of the sum of RM18,000 for touch-up and repainting and that of the rate be dealt with later while documents were requested by the arbitrator concerning the matter of the discolouration.

The measurement that was carried out was the main subject of the fourth meeting. At that meeting the arbitrator produced a table of the differing measurements taken by the applicant, the respondent and by the QS. It was then agreed by the parties that 'the QS's quantities be used as yardstick and the party who do not agree with the quantities shall substantiate their calculations to the QS for verification/confirmation.' Because the arbitrator is from the same company as the QS he is equated as being the person who took the measurement. Even assuming it is so the applicant should not be heard to complain as the applicant has agreed to the course of action by ratification in the fourth meeting. However, the arbitrator was there to observe the measurement. Even assuming that such conduct amounts to a serious breach of duty by the arbitrator if committed in the course of what as intended to be a formal arbitration, I am of the view that such conduct is entirely acceptable in the context of an informal reference, as in the present case. The facts are entirely different from that of *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd* [1999] 5 MLJ 137 where it was considered misconduct on the part of the arbitrator on account of his relationship with an architect, a party to the arbitration and where objection was taken to the arbitrator hearing the matter. In the present case the parties have agreed to use the measurement of the QS as the 'benchmark' and there is also no relationship of that sort between the respondent and the arbitrator. Furthermore, the parties by ratification have agreed to the QS taking the measurement which is not the case in *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd (No 2)* [1988] 2 MLJ 502, another case relied on by the applicant. I can see no valid ground for saying that there was misconduct in such a manner of conducting an arbitration.

I turn now to the other complaints which Ms Chan had placed under this head and these are:

- (1) He urged parties to come to compromises.
- (2) His award ignored the measurements of the independent QS, LT Juruukur Bahan Sdn Bhd submitted by the applicant.
- (3) Even for areas that parties agreed and compromised on, the final measurements relied upon by the mediator for his award were inconsistent. For examples, see para 11 (a) to (e), 16 & 17 of Sim's affidavit 2.

- A** (4) He awarded cost of the banker's guarantee against the applicant and yet on the other hand, completely ignored the loss of interest to the applicant from unpaid expenses and fees for supply and services rendered between the date when it ought to have been paid and the date of the purported award.
- B** (5) His decision on the measurements on the total areas for the external and internal finishes for Damai Lagoon Hotel is contrary to his own measurements as contained in his firm, JUBM's latest revised Variation Order (exh Sim 4) even though this was brought to his notice in the applicant's submission on p 4 item C 1(i) of the applicant's letter to the mediator dated 7 May 1999.
- C** (6) He failed to take into consideration the report from ICI Paints Technical manager submitted by the applicant (Appendix C5) that the discolouration to the external wall at Damai Lagoon Hotel was a result of surface defect, not a paint defect and therefore was wrong to have ordered the applicant to reimburse the respondent the sum of RM168,263.30 for cost of rectification.
- D** (7) He also failed to consider the applicant's submission that the amount of paint and undercoat used by the respondent would not be sufficient to cover 150,898 sq feet if the full system of one undercoat and two finish coats were carried out.
- E** (8) He was clearly wrong on the face of the award when he decided under item 7 Appendix B under Attachment V of his final report that 'item 36' has already been included in 'item 6' of the same claim. Item 6 (at p 2 annexed to Minutes of the 11 Meeting) refers to touch-up for external area to the Podium Block whereas item 36 (at p 5 of the same annexure) refers to touch-up and repainting for the internal area of the Riverside Project.
- F**

Complaint (1) cannot by any stretch of imagination be regarded as misconduct. Even in court proceedings, there is the ever present desire of a judge for the parties to resolve the matter amicably and at least to agree to some issues or facts, like ordering them to agree on a statement of facts or a statement of issues to be tried. There is no merit in this complaint.

- G**
- As for complaint (2), the measurement of LT Juruukur Bahan Sdn Bhd being ignored, Ms Chan relied on *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 where
- H** it is said that a failure to analyse and appraise material and relevant evidence affecting an award, the award will be vitiated. Had the arbitrator, then, failed to analyse and appraise the evidence of LT Juruukur Bahan Sdn Bhd? The documents accompanying the award included the measurement of LT Juruukur Bahan Sdn Bhd though it was not specifically mentioned in the award. However, arbitrator did say in the award this: 'After checking
- I** through all the evidences and records in detail ...'. Mr Frank Tang, learned counsel for the respondent, in reply referred to another passage of the same case where, at pp211-212, it is said:

When he used the phrase 'I find on the evidence' it must be taken as axiomatic that he had taken into account all material and relevant evidence and the determination of points of law and fact to suit the particular case in hand. It would be an intolerable burden on any arbitrator if he were to mention all and every piece of evidence and questions of law and fact in his award. He is not required to do that. He need only refer to material and relevant evidence to suit the key question to the dispute.

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Accordingly, I cannot say that there was any misconduct in the present case. That evidence was considered and it was obviously rejected. It cannot be misconduct just because the arbitrator prefer one set of measurement to another.

Complaint (3), talks of the arbitrator relying on 'inconsistent' measurements and rejection of the measurement of the QS. The minutes of the fifth meeting held on 29 April 1998 recorded that the parties have agreed to the following figures regarding the quantity of painting for the three blocks of buildings of Damai Lagoon Hotel project at 70,198 fs, 63,928 fs and 92,224 fs for the external wall and 130,171 fs, 81,000 fs and 161,820 fs for the internal wall. The applicant had sought clarification of the figures after the award was published. This resulted in the QS (though signed by the arbitrator) replying by a letter dated 21 August 1998 restating their figures which showed that two of the three figures for the external wall were different that is, instead of 130,171, it was stated as 201,234 fs and instead of 81,000 fs, it was 113,636 fs. However, the award in relation to the external wall was based on the said agreed figures. That the figures of the QS were not accepted by the arbitrator cannot be a ground for complaint since it, at least, demonstrates that the arbitrator was not bound by the figures produced by his own company. Mr Frank Tang had put it (and which I accept) this way:

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It was the Applicant's submission that the final measurements relied upon by Mr Wong Hai Ong in coming to his decision were inconsistent. In fact, his decision was contrary to JUBM's measurements. It is my submission that Mr Wong Hai Ong's decision was one made after taking into account all material and relevant evidence. In not following the measurements of JUBM, he has indicated that he was acting in his independent capacity as arbitrator and not as agent of his firm and was able to remain objective in considering the issues of dispute.

G

But the same cannot be said with regards to the external wall. The arbitrator had chosen not the figure of 372,991 fs which is the sum total of the agreed measurement but the figure of 414,491 fs the sum total of the figures put forth by the applicant but not accepted. The measurement of 414,491 fs was used to affix the applicant with a liability to repaint at the cost of 8 sen per fs. The difference between the two figures would yield a sum of RM3,320, that is if the agreed measurement is taken, the applicant would only have to pay RM29,839.80 and not RM33,159.28 as ordered by the arbitrator. That is clearly an error on the part of the arbitrator. I leave the matter of what follows such an error till I have dealt with the other complaints.

H

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- A** Complaint (4) relates to the cost of the banker's guarantee awarded against the applicant and the refusal to award the loss of interest to the applicant from unpaid expenses and fees for supply and services rendered between the date when it ought to have been paid and the date of the purported award. If such can be construed as misconduct then conversely a decision the other way round would also be a misconduct. This means, the
- B** arbitrator can never be right. No reasons had been given for the way the arbitrator had decided. The cost of the guarantee was the sum of M11,365.95. This guarantee was demanded by the applicant to cover their claim of RM504,818.07. The arbitrator was of the view that the applicant only succeeded in claiming RM54,128.52, which is only 10.72% of their claim, the applicant should bear 89.28% of the cost of providing the
- C** guarantee. In my view, that decision accords well with equity. I cannot see how the arbitrator can be said to have misconducted himself. As for the interest claimed by the applicant, which is a sum of RM138,302.04 the arbitrator did not deal with it at all. The applicant's claim for interest is on the ground that they have not been paid the various sums on the due date.
- D** Again, the consequence that flows from such a failure on the part of the arbitrator will be discussed later. Since complaint (5) had already been dealt with earlier I will not dwell on it but proceed with the next complaint.

- The alleged failure to accord attention to a report from ICI Paints Technical manager was the matter of the complaint (6). The arbitrator had awarded a sum of RM168,263.30 against the applicant for the cost of the
- E** rectification of the paint-job on the external wall of the Damai Lagoon Hotel project. It was the applicant's contention that the discolouration of the paint was the result of a surface defect and not of a paint defect and this was supported by the said report. This matter was discussed in the second meeting where the relevant minutes read:

- F** Unless Sebor can obtain independent proof that the discolouration is due to salt content in the plaster, they have to deliver the painted walls in acceptable condition and quality to SA Shee who in turn is responsible to the ultimate owner of the building SEDC.

- G** Clearly then, it was made known to the parties by the arbitrator that he required an independent opinion as regards whether the discolouration was due to the salt content in the plaster. He rightly rejected the opinion of ICI Paints since it was partisan and one would not expect ICI Paints to condemn its own products. I see no misconduct here.

- H** Complaint (7) is that the arbitrator had failed to consider the applicant's submission that the amount of paint and undercoat used by the respondent were not sufficient to cover 150,898 sq feet if the full system of 1 undercoat and 2 finish coats were carried out. But the arbitrator had made a finding as to the extent of repainting required and the cost of the material which he estimated to be RM181,587.45. However, because the respondent had previously billed the applicant for the sum of
- I** RM168,263.30, the arbitrator adopted that figure. The disputes as to the area had been gone into and the parties had their say and had put forth all sorts of documents. The amount was awarded after the cost, to use the

arbitrator's words, 'has been verified to be fair and reasonable'. How he arrived at the figure was set out in detail in an appendix. There is no ground for the complaint. I turn now to the last complaint under this ground.

Complaint (8) speaks of an error on the face of the record when the arbitrator concluded that the claim for RM18,000 under item 6 of the applicant's claim and for another RM18,000 under item 36 were for the same job when it is not the case. The record shows that item 6 related to touch-up for the external area of the Podium Block while item 36 related to the internal area of the Riverside Hotel project. Clearly then, when the arbitrator excluded the sum of item 36, he was wrong. Mr Frank Tang did not reply to this point presumably because it cannot be argued otherwise. The consequence of this error will be dealt with later. I turn now to the other grounds enumerated in the application and urged as justifying the interference of the award by the court.

Whether the arbitrator in deciding that the rate of painting the internal plastered wall for Damai Lagoon Hotel shall be RM0.35 per fs he has misdirected himself and erred in fact and law, or otherwise has acted unfairly against the interest of the applicant

This dispute is in relation to the Damai Lagoon Hotel project. The applicant had claimed a rate of 45 sen but was allowed only 35 sen which gave rise to a deduction of RM33,159.28 from the claim of the applicant. A finding was made that the rate of 45 sen quoted by the applicant was never accepted by the respondent. The arbitrator then made the finding that since the parties had in relation to the Riverside Hotel project agreed at the rate of 38 sen, the arbitrator applied that rate saying that it was 'reasonable'. The documents show that the applicant had in their letter 17 February 1994 quoted a rate of 43 sen a space was provided in that letter for the respondent to signify their acceptance of the quotation but there is no signature there. What followed, according to the applicant, was a letter of the respondent dated 16 March 1994 which relevant part reads: 'This serves as our letter of intent to accept your company as our sub-contractor for the painting works for the above project' and it did not refer to the February 17 letter. In this regard the arbitrator cannot be faulted for not accepting 43 sen as being the agreed figure. Again there is nothing amiss here.

The next ground concerns the cost of the guarantee and the failure to consider the award of interest for the period the moneys due but were not paid. I have already covered this ground. The consequence of the failure will be dealt with in the conclusions of this judgment.

The next ground concerns the lack of a post-award interest. Implicit in the claim of the applicant is the claim that the interest claimed be running right to the date of the award and thereafter. Since there was no objection to the award of interest, it should be awarded unless there is a valid reason for it. This matter is again remitted to the arbitrator for his consideration and decision.

The final ground concerns the sum of RM168,263.30 which the applicant was held liable as cost of the rectification. I have already dealt with this issue earlier and found it to be of no merit.

A *Conclusions*

In the premises, the award cannot stand and must be remitted to the arbitrator for his further consideration of the following matters.

- B**
- (1) When determining the cost at 8 sen per fs for the labour of repainting, the area to be reckoned should be the agreed area of 372,991 fs and not 414,491 fs;
 - (2) The claim by the applicant for interest of RM138,302.04 should be considered and reasons should be given for awarding such and for how much or for rejecting such a claim;
 - C** (3) The arbitrator must consider the question of the post-award interest and the rate to be given if it is decided that such should be awarded; and
 - (4) When considering the global figure, the arbitrator must take into account the fact that the sum of RM18,000 claimed by the applicant as item 6 and the sum of RM18,000 claimed by the applicant as item 36 are in respect of the external wall and the internal wall and not for the same wall.
- D**

E The arbitrator shall after reconsidering those matters give his award. For matters which I have said that there is nothing amiss, the arbitrator need not reconsider but need only restate his decisions with regards to them in order to come to his award after taking into account the matters which I have ordered his reconsideration. Since the applicant has succeeded in part, I allow costs of 50% to be paid by the respondent to the applicant.

Application of the applicant granted in part.

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Reported by Wong Siok Chin

G**H****I**